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'EQUAL TIME' -- THEN AND NOW

This paper was written by Edward Freedman, graduate student, in connection with his studies at the University of Missouri.

An effort has been made to present an objective view of the attitudes of both industry and government toward "equal time" legislation.

On November 2, 1920, station KDKA, Pittsburgh, the first regularly licensed broadcast station, began its regular schedule of broadcasting with the Harding-Cox presidential election returns.

The first notable use of radio in the political field, however, was the broadcasting of the Republican and Democratic National Conventions in 1924.¹ As radio grew it became more and more important in politics. For the political speakers and candidates, radio became a weapon which enabled them to reach more people in less time. Along with the growth of radio came new achievements.

In 1948, television, a comparatively new communications medium, made its major political debut. Television covered the 1948 political conventions and today is regarded "... as the most potent means through which to influence an electorate."²

Public Should Hear All Sides

It is important, therefore, to the perpetuation of our government that broadcasting facilities be made equally available to all candidates for public office. Only in this way can all sides of public issues be heard. "... because the number of broadcasters is limited by physical necessity and since, in the case of networks, millions listen at one time, it is imperative that all sides be fairly treated."³ Insuring a fair balance of discussion of public questions by political candidates and avoiding the danger of governmental control of broadcasting on the one hand and the political abuse of such control in private hands on the other presents a great problem in radio and television.⁴

Today, and since 1927, the broadcasting industry is bound by statute to afford "equal opportunities" to candidates for public office.

It is the purpose of this study (1) to trace the history and development of equal time legislation; (2) to study some of the problems it has created; and (3) to attempt

to show the attitude of the broadcasting industry toward this legislation.

Definitions

Licensee: Refers to the holder of a radio station license granted or continued in force under the Radio Act of 1927 or the authority of the Communications Act of 1934.

Station: Refers to a radio or television station which is equipped to engage in radio or television communication or transmission of energy.

Broadcasting: Means the dissemination of radio or television communications intended to be received by the public, directly or by intermediary relay stations.⁵

Background in Legislation

The proposals for government regulation first appeared before radio broadcasting *per se* started. The principle of supervision started in 1904 when President Theodore Roosevelt's Inter-Departmental Board recommended that private stations be placed under government supervision in order to regulate for their "mutual and public welfare."⁶

Of all the bills introduced in Congress since 1904, four bills contain the fundamental laws on which our broadcasting regulations are based. These are: the Wireless Ship Act of 1910, the Radio Act of 1912, the Radio Act of 1927, and the Communications Act of 1934.

The Wireless Ship Act of 1910 applied to the use of radio by ships. The first comprehensive piece of domestic radio regulation in the United States was the Radio Act of 1912. It made the Secretary of Commerce and Labor (changed in 1913 to the Secretary of Commerce) responsible for licensing radio stations and operators.⁷

'Experiments in Self-Government'

For about ten years this was the extent of government regulation in radio. However, with the advent of broadcasting in the early 1920's serious problems arose. There was a demand for more and more stations and the rapid increase created intolerable interference on the airwaves. The Secretary of Commerce, under the Act of 1912, could not refuse to grant licenses.

The sudden expansion in the number of stations with-

1. United States Federal Communications Commission, *Radio, A Public Primer* (Washington: Government Printing Office, 1947), p. 1.

2. Charles A. H. Thomson, *Television, Politics and Public Policy* (Washington: The Brookings Institution, 1958), p. 368. (Reprinted from *Public Policy: A Yearbook of the Graduate School of Public Administration*, Harvard University, Vol. VIII, 1958.)

3. William S. Paley, president, Columbia Broadcasting System. Excerpts from an address given in Chicago, Illinois, November 29, 1937, entitled "The American System of Broadcasting," *Congressional Record*, Vol. LXXXII, Part 3, p. 265.

4. Thomas P. Robinson, *Radio Networks and the Federal Government* (New York: Columbia University Press, 1943), p. 218.

5. Harry P. Warner, *Radio and Television Law* (Albany, New York: Matthew Bender & Company, Inc., 1948), p. 876, citing *Communications Act of 1934, as amended*, Section 3.

6. Melvin R. White, "Radio Program Policy," *Western Speech*, XV (May, 1951), p. 13.

7. United States Federal Communications Commission, *Radio and Television Broadcast Primer* (Washington: Federal Communications Commission, 1959), p. 1. (Hereafter Federal Communications Commission will be referred to as FCC.)

out adequate controls resulted in chaos. It was obvious that the number of stations had to be controlled in some way. Herbert Hoover, then Secretary of Commerce, attempted to get the broadcasting industry to regulate itself. National Radio Conferences were held annually from 1922 to 1925 in an attempt at what Hoover termed "experiments in industrial self-government."⁸

Radio Act of 1927

At the request of the National Radio Conferences and President Coolidge, Congress attempted to alleviate the bedlam on the air with the Radio Act of 1927 which established a five-man Federal Radio Commission. The bill which became the Radio Act of 1927, H.R.* 9971, was introduced in the House of Representatives by Rep. Wallace H. White, Jr., of Maine, and in the Senate by Sen. Clarence Dill of Washington. Between the date of its introduction early in 1926, and its enactment into law on February 23, 1927, the Radio Act was the subject of prolonged discussion.⁹

In the House debates, Rep. Ewin L. Davis of Tennessee stated that the licensees should be forced by law to

... give equal treatment to all. As it stands now they are the arbiters of the air [the broadcasters]. They can permit one candidate to be heard through their broadcasting stations and refuse to grant the same privilege to his opponent ... there is absolutely no restriction whatever upon the arbitrary methods that can be employed, and witnesses have appeared before our committee and already have given instances of arbitrary and tyrannical action in this respect, although the radio industry is still in its infancy.¹⁰

The discussions of politics on the air, both on H.R. 9971 and previous bills, led to Sen. Dill's amendment:

If any licensee shall permit a broadcasting station to be used by a candidate or candidates for public office, he shall afford equal opportunities to all candidates for such public office in the use of such broadcasting station; *Provided*, that such licensee shall have no power to censor the material broadcast under the provisions of this paragraph and shall not be liable to criminal or civil action by reason of any uncensored utterance thus broadcast.¹¹

The amendment was modified in committee to apply only to "legally qualified candidates," and provided that no obligation be imposed upon a licensee by the section to permit any such candidate to use its station. In addition, the committee eliminated the language which relieved the stations from criminal or civil liability by reason of any uncensored utterances under the provision. This amendment, as modified, became Section 18 of the Radio Act of 1927, and reads:

If any licensee shall permit any person who is a legally qualified candidate for any public office

to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.¹²

Federal Radio Commission Criticized

In 1928, the industry urged the Federal Radio Commission (FRC) to give precise definitions of its phrases and criticized it for not doing so. The FRC answered that arriving at precise definitions which would foresee all eventualities was manifestly impossible, that it would probably have to be defined by the United States Supreme Court through a gradual process of decisions on particular combinations of fact.¹³

By eliminating the clause in Sen. Dill's amendment which pertained to liability of the station, and by not precisely defining its terms, Congress and the FRC had dropped a time bomb into the lap of the broadcasting industry. The first explosion came in 1932.

Station KFAB, Lincoln, Nebraska, allowed a political candidate, C. A. Sorenson, to speak over its facilities. Richard F. Wood used the facilities of the station to speak on behalf of another politician. Sorenson brought action against Wood and the KFAB Broadcasting Company for certain false and libelous statements made on the air. The Supreme Court of Nebraska held the station jointly liable with the defamer. The decision declared "... that due care and honest mistakes do not relieve a broadcasting station from liability for libel."¹⁴

Industry Perturbed

The industry was greatly perturbed. By statutory regulation it was required to refrain from censorship of the views of candidates for political office who used its facilities. Thus it was liable for libel, but could not censor political speeches in order to prevent the broadcast of libelous statements over its facilities.

The case of *Sorenson vs. Wood* was appealed to the Supreme Court of the United States (the body to which the FRC had left the determination of its definitions), but that body announced its refusal to review the case, dismissing the appeal for the reason that the judgment which the state court sought to be reviewed was based upon a non-federal ground inadequate to support it.¹⁵ The industry had been dealt a severe setback in its first major encounter with "equal time."

Communications Act of 1934

In 1933, legislation was attempted which would alleviate the problems that Section 18 had presented to the broadcasting industry. Both defamation by radio and equality of treatment for political candidates were discussed in both Houses. Harold A. Bellows, chairman of

* H.R. refers to abbreviation for House of Representatives; S. would be placed before legislation of the Senate.
8. Sydney W. Head, *Broadcasting in America* (Boston: Houghton Mifflin Company, 1956), p. 130, citing Third National Radio Conference, *Recommendations for Regulation of Radio* (Washington: Government Printing Office, 1924), p. 2.
9. Melvin R. White, *History of Radio Regulation Affecting Program Policy* (unpublished Ph.D. Dissertation, University of Wisconsin, Madison, 1948), p. 134.
10. *Congressional Record*, Vol. LXVII, Part 5, p. 5480.
11. *Ibid.*, Part 11, p. 12502.

12. United States Congress, House of Representatives, 1927, *House Report 1885*, 69th Congress, 2d Session (Washington: Government Printing Office, 1927), p. 18.
13. United States Federal Radio Commission, *Annual Report of the FRC to the Congress of the United States for the year ending June 30, 1928 together with A Supplement Report for the Period from July 1, 1928 to September 30, 1928* (Washington: Government Printing Office, 1928), p. 168.
14. White, Ph.D. Dissertation, *op. cit.*, pp. 333-36.
15. *Ibid.*, p. 336.

the Legislative Committee of the National Association of Broadcasters (NAB), asserted that the broadcasters were ready to accept the responsibility for libel and slander,

... but in that case we must have the right to go over speeches in advance and see what is in them, for we can not wait until they are on the air . . . Section 18 of the present law admittedly does need revision, both to safeguard the right of free speech and to protect the broadcasters, but certainly we do not want to see our liability for slander increased to a point where we shall have to bar all candidates for public office . . . from the air . . . [we] recommend to Congress such legislation as it may decide is needed.¹⁶

No specific legislation concerning "equal time" resulted from these hearings.

The Radio Act of 1927 was incorporated into the Communications Act of 1934 and remains as essentially the same legislation under which the broadcasting industry operates today. The FRC was expanded from five to seven members and its title changed to the Federal Communications Commission (FCC). Section 18 of the Act of 1927 was retained in a substantially unaltered form as Section 315 of the Communications Act.

Section 315 'Troublesome'

The Communications Act of 1934 is silent on the broadcast of controversial issues. The only pertinent provision is the one which authorizes the Commission to regulate broadcasting of political speeches and it appears doubtful that this provision could establish actual authority to control all discussions, political or otherwise. Consequently, freedom of discussion of controversial issues depends on the rules and regulations of the FCC, based on the requirement that standard broadcasting stations operate in the "public interest, convenience and necessity."¹⁷

Section 315 has been one of the most troublesome provisions of the Communications Act, not only because of the inherently controversial nature of politics but also because of a conflict in laws. In prohibiting the licensee from censoring speeches of political candidates, Congress thought that the licensees who might favor one candidate could get around the intention of the statute by censoring the speeches of his opponent. However, the individual states have jurisdiction in cases of defamation and the licensee is prohibited by federal statute from possibly avoiding an actionable wrong under state law.

NAB Opposed All Legislation

In 1935, at its annual convention, the NAB reiterated its former declaration that it opposed all legislation and governmental regulations, "the effect of which would result in the abridgement of freedom of speech."¹⁸ In the same year, three bills were introduced in the House of Representatives on radio censorship. H.R. 9230 and 9231 concerned Section 315. The first wanted the licensees to lay aside time for political and other uncensored broadcasts. The other provided that a new paragraph be included in Section 315, requiring the keeping of records

of political broadcasts and requests for time therefor.¹⁹ Neither of these bills was passed.

The broadcasters were naturally inclined to protect themselves in whatever way possible. This led to more trouble for the lawmakers. In 1937, Roger Jones, owner of station KVOS, Bellingham, Washington, adopted a number of regulations designed to govern the conduct of the station from a political standpoint. Briefly, these regulations were as follows:

... that during political campaigns, copies of all political speeches were to be submitted to the station a certain number of hours in advance; that all sales of political time must be confirmed by Jones; that news announcers must verify all news broadcasts and that news must be broadcast in an unbiased manner.²⁰

Jones stated that the purpose of the regulations regarding the submission of political speeches in advance was to provide an opportunity to check them for libelous statements. If such statements appeared, the candidate was asked to change them; if the candidate refused to do so, Jones checked them with his lawyer, and if the latter was of the opinion that the speech contained libelous material, the prospective speaker was informed that he must either change the speech or not broadcast.²¹

Doubtful Practices Continue

The FCC held hearings for eight days and reported that, subsequent to July 1937, instances were presented which showed the continuance to some degree of doubtful practices, particularly with respect to treatment of candidates for public office. "The evidence suggests, but is not conclusive, that 'equal opportunity' was not afforded such candidates and that censorship of the candidates' speeches may have been imposed."²²

The FCC has the power to issue and withhold licenses. If the Commission decides that a station is operating in a manner which does not display "public interest, convenience or necessity," it can deny the issuance of a license. In this case no action was taken.

On July 1, 1938, the FCC adopted rules governing political broadcasting under Section 315 of the Communications Act. The following order was published:

It is hereby ordered that the following rules be included in the Rules Governing Standard Broadcast Stations (Chapter III, part 36):

Rule 36a 1. No station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other such candidates for that office to use such facilities; provided, that such licensee shall have no power of censorship over the material broadcast by any such candidate.

Rule 36a 2. The following definitions shall apply for the purposes of Rule 36a 1.

(a) "a legally qualified candidate" means any person who has met all the requirements pre-

19. Congressional Record, Vol. LXXX, Part 1, p. 973.

20. U.S. FCC, Docket No. 5478 and No. 5532, *In the matter of Bellingham Broadcasting Co. et. al.* (Washington: Government Printing Office, 1940), p. 166.

21. White, Ph.D. Dissertation, op. cit., p. 683.

22. FCC Dockets 5478 and 5532, op. cit., p. 165.

16. Warner, op. cit., pp. 316-18.

17. White, Ph.D. Dissertation, op. cit., p. 966.

18. NAB Reports, Vol. 3, No. 55, Nov. 29, 1935. p. 1088.

scribed by local, state or federal authority, as a candidate for the office which he seeks, whether it be municipal, county, state or national, to be determined by the applicable local laws.

(b) "other candidates for public office" means all other legally qualified candidates for the same public office.

Rule 36a 3. The rates, if any, charged all such other candidates for the same office, shall be uniform and shall not be rebated by any means, directly or indirectly; no licensee shall make any discrimination in charges, practices, regulations, facilities, or services for or in connection with service rendered pursuant to these rules, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for public office to broadcast to the exclusion of other legally qualified candidates for the same public office.

Rule 36a 4. Every licensee shall keep and permit inspection of a complete record of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if request is granted.²³

FCC Investigated

In 1943, the House of Representatives appointed a committee to investigate the FCC. During these hearings members of the broadcasting industry testified and reiterated their request for a clarification of terms. "Perhaps the most common viewpoint expressed by representatives of the industry has been its desire to have its relations and duties to the government clearly defined in order that they may operate with more certainty that they are within their rights, and conforming to all the regulations of the Commission."²⁴ The committee recommended that Congress clarify the law of radio:

... the uncertainties of interpretation, so far as possible consistent with the exercise of the reasonable discretionary powers of the Commission, should be removed. The rights and duties of the industry should be more clearly defined, likewise the powers, duties and limitations of the Commission should also be considered, and necessary amendments made to conform to good practice and as developed by experience.²⁵

Again Congress took no specific legislative action regarding Section 315. And again the industry met problems.

In 1945, FCC hearings were held to determine whether WDSU, New Orleans (Stephens Broadcasting Co.), had violated Section 315. The FCC decision read:

Consequently, where station allowed one of its principal stockholders, who was a candidate for political office, to broadcast during choice weekday evening hours, its offer to make available to another candidate less desirable time in the late evening was not a satisfactory fulfillment of the

statutory requirement . . . nor was its belated offer to grant time during the hours on Saturday evenings allowance of "equal opportunities." The station manager testified that the established policy was not to cancel any regularly scheduled commercial program in order to clear time for political broadcasting, but to restrict them to sustaining time . . . [this policy] . . . reflected such a complete failure on part of licensee to understand its obligations to operate in the public interest as to require severe censure of such policy. Under the Communications Act of 1934 . . . a licensee has both the right and the duty to cancel such previously scheduled programs as may be necessary in order to clear time for broadcasts of time in the public interest.²⁶

The FCC again took no action to withhold the license.

FCC Establishes Principles

On January 30, 1948, the FCC laid down a number of important principles governing broadcasts under Section 315. The action came in a decision on the application of Station WHLS, Port Huron, Michigan, for renewal of license.

Briefly, the situation was this: The licensee of WHLS permitted a candidate for political office to broadcast a "public service" program. This supposedly was not a campaign move but a program which was broadcast in the public interest. The topic under discussion happened to be one of the main issues of the political campaign. Later, other candidates made applications for time on the air. The licensee contracted with one of them for broadcast time, but upon reading his speech, held it was libelous and refused to carry the program. Complaints were registered with the FCC, and when WHLS came up for relicensing, the Commission called hearings.

The Commission made its first clear pronouncements on Section 315 in this decision. It held:

(1) that the prohibition in Section 315 against censorship of political speeches prevents a station licensee from requiring a person making a political speech to make changes or alterations or deletions in his prepared text to eliminate material which the station believes is possibly libelous or slanderous or might tend to subject the station to an action for damages;

(2) that Section 315 constitutes an "occupation of the field" by federal authority and relieves the station from any liability for the broadcasting of libelous or slanderous material in a political speech (this is in opposition to the ruling of the Nebraska Supreme Court in *Sorenson vs. Wood*, cited earlier);

(3) that cancellation of further political broadcasts by all candidates after broadcast of one speech, which contained attacks on other political figures in the community not then candidates, and submission of another speech made by the same candidate containing further attacks on the same persons, constituted an act of censorship.²⁷

Industry Reacts Violently

The industry reacted violently to what was termed "judicial law-making by an administrative agency" in an editorial by *Broadcasting* magazine on February 9, 1948.

23. NAB Code Compliance Committee, *Code Manual* (Washington: NAB, n.d.), p. 10.

24. United States Congress, House of Representatives, *Study and Investigation of the FCC, Hearings before the House Select Committee to Investigate the FCC, 78th Congress, 1st Session*, (Washington: Government Printing Office, 1943), p. 50.

25. *Ibid.*, p. 53.

26. U.S. FCC, Docket No. 6740, *Hearings to determine whether WDSU (Stephens Broadcasting Co.) violated Section 315 of the Communications Act of 1934*, September 4, 1945 (Washington: Government Printing Office, 1945).

27. U.S. FCC, Docket No. 6987, *Port Huron Broadcasting Company (WHLS) Port Huron, Michigan* (Washington: Government Printing Office, 1948).

The magazine claimed that the four-man majority hurled defiance in the faces of the states, the Congress, and the Supreme Court. The editorial continued "... The FCC majority says ... the broadcaster will just have to carry that which any wild-eyed politician wants to spout, whether it's obscene, libelous or subversive. Once the station opens its microphone to one candidate it is open sesame to all others ... It is understandable that the first reaction is to rule out political broadcasts altogether."

The FCC was being attacked from all sides. Congress attempted to amend Section 315 many times. Finally, on April 8, 1952, a bill was submitted by the House Committee on Interstate and Foreign Commerce which would "... further amend the Communications Act of 1934." Section 11 of this bill provided an addition to Section 315. The new text changed the original Section 315 to 315(a) and added two subsections. These were:

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.²⁸

Subsection (b) was offered as part of the Horan Amendment which also would have absolved a broadcast licensee from any civil or criminal liability in the case of a political broadcast. The Conference Report rejected the above provision.²⁹

Problems in Political Telecasting

Early in 1952, the broadcasting industry discovered, through its experience with William G. Schneider, that the problems which 315 raised for political telecasting might not be as easy to handle as were the similar problems which were handled by radio. Schneider, a St. Louis Republican, insisted on "equal time," on the Columbia Broadcasting System (CBS) network, to match the speeches of Eisenhower and Taft.

The network was unable to dissuade him and the issue was taken to the FCC and the courts where Schneider was granted a half hour each over nationwide radio and television, on his proving that he was a bona fide presidential candidate, having filed in the primaries in New Hampshire and Oregon. Again the industry reacted rapidly.

The industry in general and the networks in particular reassessed the risks run by allowing candidates to use their facilities. Campaigning congressmen found broadcasters adamant against requests to use television on a public service basis. Partly in response to these problems and the policies of the broadcasters and partly in response to related problems of campaign and elections, several hearings and investigations by special committees and subcommittees of both the House and Senate took place in 1955 and 1956.

Changes Proposed to Help Networks

During the course of these hearings, there was considerable testimony and discussion of proposed changes in 315, not only for the purpose of amending the rule

governing equal time on the air, but also to clarify the liability of licensees to suits for libel and slander arising from speeches of candidates that the stations had no power under the law to censor.

The many proposals had the common object of making it easier for networks and stations to bring the "substantial" candidates of the major parties before their cameras and microphones, without running risks of equal treatment for "insubstantial candidates of major parties, or candidates of splinter parties with no following and little of public importance to say."³⁰

Again, as in previous attempts, this legislation was not passed.

Eisenhower and the Suez Crisis

The most prominent problems with Section 315 in the national election of 1956 arose when President Eisenhower was granted time by the networks on October 31, to address the nation on the Suez crisis. The networks asked the FCC for a declaratory ruling as to whether this "use" required granting of equal time to other candidates for the office of President.

The FCC replied on November 1, in its Public Notice 38337, that it could not make such a ruling because the application of 315 in these circumstances depended "on such an involved and complicated legal interpretation." But on November 5, the Commission issued its Public Notice 38387, stating that "the majority has now after further examination of this problem reached a conclusion that we do not believe that when Congress enacted Section 315 it intended to grant equal time to all presidential candidates when the President uses the air lanes in reporting to the nation an international crisis."

After receiving this decision, the networks gave time to Stevenson to reply to the President without invoking 315. By using the standard of fairness in the discussion of public issues the networks were able to keep other candidates from asking for equal time with the President.³¹

Section 315 Today

Although this was the biggest national problem in 1956 concerning 315, the most important one as far as the industry was concerned occurred during the senatorial campaign in North Dakota.

Independent candidate A. C. Townley demanded and received equal time to answer speeches by his two opponents over WDAY and WDAY-TV, Fargo, North Dakota.

As a result of statements contained in this speech, the Farmers Union filed a \$100,000 libel suit against the station and the candidate. The Fargo station held that it was not responsible for Townley's remarks because federal law required that it carry the political broadcast without censorship. (This argument stemmed from the FCC opinion in the Port Huron case.) A lower court and the North Dakota Supreme Court ruled in favor of the station.

The NAB, believing this case an ideal vehicle for establishing immunity for broadcasters, worked with WDAY in preparing arguments.³² When the ruling of the North Dakota Supreme Court was appealed to the United States Supreme Court, NAB Chief Counsel Douglas A. Anello argued the case on March 23, 1959, sharing the time with WDAY's attorney. In the opening statements of the brief filed before the U.S. Supreme Court,

28. Public Law, 544, 82d Congress, 2d Session, 66 Stat. 711, section 11.
29. United States Congress, Senate, Conference Report No. 2426, which accompanied S. 658, 82d Congress, 2d Session, (Washington: Government Printing Office, 1952).

30. Thomson, *op. cit.*, pp. 370-73.

31. *Ibid.*, p. 375.

32. News item in the NAB Highlights, July 6, 1959.

Counsel Anello gave the reasons why the NAB had stepped into the case.

Because the case at hand involves great problems affecting not only the membership of the Association [NAB] but all broadcasters throughout the United States, the Association has sought and received permission of the parties herein to appear as *amicus* [friend of the court] so that it may present to the Court its views on a most critical problem. The Association does not believe that Section 315 of the Communications Act is necessary because of its view that the broadcaster can as well serve the public in the field of political broadcasting, without legislative stricture, as he has done in all other fields of programming. Congress has nevertheless legislated on the subject. It is now up to this court to determine the meaning and legal effect of that legislation.³³

The summary of the arguments of the NAB made these points:

(1) If Section 315 of the Communications Act of 1934 completely prohibits censorship of political broadcasts, it should also be interpreted to grant complete immunity to the licensee.

(2) If Section 315 does not grant complete immunity, it should be held unconstitutional as a violation of the due process clause of the Constitution.³⁴

Radio and TV Ruled Immune to Libel

As early as 1927, certain congressmen attempted to exempt the licensee from liability for utterances over which he had no right of censorship, as in the case of political speeches. It will be recalled that the amendment by Sen. Dill in 1927 contained a clause of this type which was deleted when the bill was in committee; the Horan amendment in 1952 also contained a clause of this type but was overlooked in the final legislation. In 1932, the Nebraska Supreme Court had ruled that the station "was jointly liable with the defamer," in the decision of *Sorenson vs. Wood*, cited earlier.

Finally on June 29, 1959, the U.S. Supreme Court, in a 5-4 decision, upheld the North Dakota courts, ruling that radio and television stations are immune from libel action in connection with speeches made by political candidates. The decision held that Congress had granted implied immunity under Section 315 of the Communications Act by requiring stations to give equal time to opposing candidates, but barring broadcasters from censoring candidates' speeches. The court emphasized that all persons are still protected against defamation in that libel action may be brought against any individual making a libelous or defamatory statement.³⁵

Lar Daly Case

While the NAB was fighting and winning this major decision concerning 315, another issue was developing. On February 19, 1959, the FCC issued its interpretations relating to the applicability of Section 315 to certain newscasts carried by several television stations in Chicago.

These interpretations were based on these facts: Primary elections for the office of mayor of Chicago were to be held February 24, 1959. Prior to this date, Lar Daly filed a complaint alleging that certain Chicago

television stations had, in the course of their newscasts, shown film clips of his primary opponents (incumbent mayor of Chicago, Richard J. Daley, in the Democratic primary, and Timothy Sheehan in the Republican primary), that he had requested equal time of said stations, and that his requests had been refused.

With two exceptions, the Commission, by unanimous vote, held that the film clips constituted a Section 315 "use" entitling Lar Daly to equal opportunities. The same ruling followed a 4 to 3 vote on the two exceptions, consisting of Mayor Daley's greeting of President Frondizi of Argentina at Midway Airport in Chicago, and Mayor Daley's appeal for contributions in connection with the March of Dimes campaign.³⁶

News Coverage of Campaigns

For over three decades the consensus of opinion had been that Section 315 did not apply to news coverage of political campaigns. In spite of the many legislative proposals dealing with political broadcasting, no serious challenge had been made to the established practice by the stations of inserting recorded portions of appearances by candidates into their radio and television news broadcasts.

On October 1, 1958, the FCC issued a public notice dealing with "Use of Broadcast Facilities by Candidates for Public Office" in which it answered a series of questions in an attempt at a "codification of the determinations of the Commission with respect to the problems which have been presented to it [FCC] and which appear likely to be involved in future campaigns. The purpose of this report is the clarification of licensee responsibility and course of action when situations herein are encountered."³⁷

Question 12 of this public notice reads:

Q. When a station, as part of a newscast, uses film clips showing a legally qualified candidate participating as one of a group in official ceremonies and the newscaster, in commenting on the ceremonies, mentions the candidate and others by name and describes their participation, has there been a "use" under section 315?

A. No. Since the facts clearly showed that the candidate had in no way directly or indirectly initiated either filming or presentation of the event, and that the broadcast was nothing more than a routine newscast by the station in the exercise of its judgment as to newsworthy events.³⁸

Industry Rebels

The broadcasting industry rebelled at the FCC's "Lar Daly" decision. On March 14, Dr. Frank Stanton, president of the Columbia Broadcasting System, unleashed a bitter verbal attack on the decision. Speaking at the annual conference of CBS-TV affiliates in Chicago, Dr. Stanton said the decision posed:

very serious implications not only for (television) but for the whole question of the effective working of democracy under the pressure of modern life. . . . If upheld, the decision will have two inevitable results. One will be an immediate practical effect on news broadcasting that can abridge

33. Brief of NAB as *Amicus Curiae*, pp. 2-3, (Farmers Educational and Cooperative Union of America, North Dakota Division, a Corporation, vs. WDAY, Inc., a Corporation), Supreme Court of the United States, October Term, 1958.

34. News Item in the NAB Highlights, February 16, 1959.

35. *Ibid.*, July 6, 1959.

36. United States Congress, Senate, *Equal Time Amendment to Communications Act of 1934*, Report to accompany S. 2424, July 22, 1959 (Washington: Government Printing Office, 1959). pp. 4-5.

37. U.S. FCC. Public Notice 63585, (Washington: Government Printing Office, 1958), p. 1.

38. *Ibid.*, p. 2.

radically both the usefulness of radio and television to our society and their total freedom as media. The second will be to set loose a thoughtless quantitative theory governing the role of journalism in a democracy that can be described only as a wholesale negation of principles that have been safeguards and supports of our democracy from its beginnings.³⁹

Stanton was not the only one attacking the FCC decision; newspaper editorials appeared in papers all over the country terming the decision "slightly silly," "nonsense," "a dreary bore," "farce," "unjust," "monstrosity," and capping them all was the comment made by President Eisenhower, on March 18, which termed the ruling "ridiculous." An Associated Press dispatch in the *Washington Post* and *Times Herald* on March 19 stated:

White House Press Secretary James C. Hagerty gave the President's views Wednesday, with some vigor. . . . Hagerty said Eisenhower was not criticizing the FCC for its interpretation of the law, nor was he criticizing other provisions seeking to assure fair treatment. "The emphasis here is that it is ridiculous to have the law tell radio stations they have to give equal time in the coverage of news."

Government Figures Unhappy

Eisenhower was not the only major government figure unhappy with the FCC decision. FCC Chairman John Doerfer issued an appeal for repeal of Section 315. He said that he favored wiping the controversial 31-year-old law off the books. If abuses developed, he said, safeguards could then be written into a new law.⁴⁰ However, the Commission would not be swayed by the overwhelming adverse opinion. On June 15, the FCC reaffirmed its ruling with the vote remaining 4-3.

Following the February 19 interpretation in the so-called "Lar Daly" case, four bills were introduced in the U.S. Senate and one in the House of Representatives. The Senate bills fell into two categories: S. 1604 and S. 1929 would exempt from the equal time provision of the Communications Act—"appearance by a legally qualified candidate on any news program including news reports and news commentaries." S. 1585 and S. 1858 would exempt from the equal time provision "newscasts, news documentaries, news interviews, panel discussions, debate or similar type programs."⁴¹ The House bill, H. R. 7985, would exempt from the equal time requirement any appearance on a "bona fide newscast (including news interviews) or any on-the-spot coverage of news events (including but not limited to political conventions and activities, incidental thereto), provided appearance of the candidate is incidental to the presentation of the news."⁴²

Congress Enacts Amendment

On September 14, 1959, Congress enacted an amendment to 315 which provided that equal time shall not apply to new and other similar programs. The law stated:

That Section 315(a) of the Communications Act is amended by inserting at the end thereof the following sentences:

Appearance by a legally qualified candidate on any — (1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or the subjects covered by the news documentary), or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Section 2. (a) The Congress declares its intention to reexamine from time to time the amendment to section 315 (a) of the Communications Act of 1934 made by the first section of this Act, to ascertain whether such amendment has proved to be effective and practicable.

(b) To assist the Congress in making its re-examination of such amendment, the FCC shall include in each annual report it makes to Congress a statement setting forth (1) the information and data used by it in determining questions arising from or connected with such amendment and (2) such recommendations as it deems necessary in the public interest.⁴³

The bill was passed in the House (142-70) on September 2 and passed by the Senate by voice vote the next day.

'Interpretation' More Important than 'Wording'

This then is how Section 315 reads today. But it is not the wording which is important; it is the interpretation. Speaking before the Radio-Television News Directors Association (RTNDA), in New Orleans, in October, FCC Chairman Doerfer interpreted the new provision, stating that "The extension of the 'reasonable opportunity' provision to issues rather than just the qualified candidates imposes new and additional burdens upon the broadcaster." Doerfer continued,

No longer can he refuse his facilities to those who request to speak on behalf of the candidate. Before the amendment, the Commission determined that the privilege was a personal one. It extended to the candidate alone. Now, apparently, substitutes can, and must, be permitted . . . and it may be persons who do not even purport to speak on behalf of any candidate. Apparently any responsible person who has opposing views can now get into a political hassle on the air.⁴⁴

NAB Counsel Anello disagreed with the interpretation of Doerfer. On October 30, 1959, Anello stated that "Section 315 never was, and is not now, directed at insuring equality of treatment of political parties on gen-

39. Frank Stanton, president, Columbia Broadcasting System, Inc., Statement on the FCC ruling abridging political coverage in regular news broadcasts at a Conference of CBS Television Network Affiliates, Chicago, March 14, 1959.

40. "Chance for Cure of Section 315?" *Broadcasting*, LVI, (March 23, 1959), pp. 31-32.

41. United States Congress, Report to accompany S. 2424, op. cit., p. 7.

42. United States Congress, House of Representatives, Committee on Interstate and Foreign Commerce, Amending Section 315 of the Communications Act of 1934, Report No. 802 to accompany H.R. 7985, 86th Congress, 1st Session, August 6, 1959 (Washington: Government Printing Office, 1959), p. 1.

43. Public Law 86-274, 86th Congress, 1st Session, S. 2424, September 14, 1959.

44. "RTNDA Cites Rising News Stature," *Broadcasting*, LVII, (October 19, 1959), pp. 70-71.

eral questions of public interest. Equality applies to candidates alone."⁴⁵

First Test of New Section 315

Even as Counsel Anello was speaking, wheels had been set in motion for the first test of the new Section 315.

On October 29, Joseph A. Schafer, unsuccessful candidate for the Republican nomination for mayor of Philadelphia, running as an Independent write-in candidate in the general election, complained to the FCC that WCAU-TV, Philadelphia, had refused his request for equal time. Mr. Schafer claimed that the CBS-owned station had refused to put him on "Eye on Philadelphia," a community affairs type show, although the show had presented three other candidates on successive days.

CBS answered for WCAU-TV and explained that it considered the show a regularly scheduled "news broad-

cast" exempt from the provisions of Section 315. On November 2, the FCC wired Mr. Schafer:

absence of specific factual allegation on concrete evidence that "Eye on Philadelphia" is not a bona fide news interview, Commission [is] unable to determine at this time that you are entitled to an equal opportunity with the meaning of Section 315.⁴⁶

This was the first FCC ruling after the latest amendment to Section 315. Still, however, the interpretation problems remain. Again, as in 1927 and 1934, Congress and the FCC have not defined their terms, for example, for a bona fide newscast, news interview, news documentary and news event.

The interpretation problem will have to be solved by the courts as it has been in the past. The 1960 presidential election year promises to give 315, as amended, a stern test in both interpretation and applicability.

45. Address by Douglas A. Anello before the Minnesota Broadcasters Association, Minneapolis, October 30, 1959.

46. "First Test of New Sec. 315." *Broadcasting*, LVII, (November 9, 1959), p. 84.

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